

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JULIE S.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

Case No. 3:19-cv-06008

ORDER REVERSING AND  
REMANDING DEFENDANT'S  
DECISION TO DENY BENEFITS

Plaintiff has brought this matter for judicial review of Defendant's denial of her applications for disability insurance ("DIB") and supplemental security income ("SSI") benefits.

The parties have consented to have this matter heard by the undersigned Magistrate Judge. 28 U.S.C. § 636(c); Federal Rule of Civil Procedure 73; Local Rule MJR 13. For the reasons set forth below, the undersigned agrees that the ALJ erred, and the ALJ's decision is reversed and remanded for an award of benefits.

I. ISSUES FOR REVIEW

1. Did the ALJ err in evaluating the medical opinion evidence?
2. Did the ALJ properly assess opinions from other sources?
3. Did the ALJ properly assess Plaintiff's symptom testimony?
4. Was the ALJ properly appointed pursuant to the Appointments Clause of the United States Constitution?

1 II. BACKGROUND

2 Plaintiff first filed applications for DIB and SSI in 2004. AR 13. Plaintiff's  
3 applications were denied initially and upon reconsideration. *Id.*

4 Plaintiff filed new applications for DIB and SSI on March 11, 2014 and May 6,  
5 2014 respectively, alleging in both applications a disability onset date of August 1, 2008.  
6 AR 13, 120-21, 122-30. Plaintiff's applications were denied initially and upon  
7 reconsideration. AR 13, 82-84, 86-87, 88-90.

8 Administrative Law Judge ("ALJ") Vadim Mozyrsky held a hearing on February  
9 10, 2016. AR 28-50. On April 18, 2016, ALJ Mozyrsky issued a decision finding that  
10 Plaintiff was not disabled. AR 10-23, 505-18. On July 27, 2017, the Social Security  
11 Appeals Council denied Plaintiff's request for review. AR 1-6, 523-28.

12 On August 25, 2017, Plaintiff filed a new application for SSI. AR 641-47.  
13 Plaintiff's application was denied on initial review and upon reconsideration. AR 576-79,  
14 580-83, 589-95.

15 On May 22, 2018, this Court granted a stipulated motion to reverse and remand  
16 this case for further administrative proceedings. AR 556-67. On December 8, 2018, the  
17 Social Security Appeals Council vacated ALJ Mozyrsky's April 18, 2016 decision,  
18 consolidated Plaintiff's claims, and remanded this case for re-consideration of Plaintiff's  
19 symptom testimony and the opinion of examining psychologist William Weiss, Ph.D. AR  
20 568-74.

21 On May 24, 2019, ALJ Mozyrsky held a new hearing. AR 466-504. On June 25,  
22 2019, ALJ Mozyrsky issued a decision finding Plaintiff not disabled. AR 442-57.

23 Plaintiff seeks judicial review of ALJ Mozyrsky's June 25, 2019 decision. Dkt. 5.  
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1 III. STANDARD OF REVIEW

2 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's  
3 denial of Social Security benefits if the ALJ's findings are based on legal error or not  
4 supported by substantial evidence in the record as a whole. *Revels v. Berryhill*, 874  
5 F.3d 648, 654 (9th Cir. 2017). Substantial evidence is “such relevant evidence as a  
6 reasonable mind might accept as adequate to support a conclusion.” *Biestek v.*  
7 *Berryhill*, 139 S. Ct. 1148, 1154 (2019) (internal citations omitted).

8 IV. DISCUSSION

9 In this case, the ALJ found that Plaintiff had the severe, medically determinable  
10 impairments of anxiety, attention deficit hyperactivity disorder, bipolar disorder, post-  
11 traumatic stress disorder, and obsessive compulsive disorder. AR 448. The ALJ also  
12 found that Plaintiff had the non-severe impairments of headaches, status post left distal  
13 clavicle fracture, and aortic valve insufficiency. AR 448-49.

14 Based on the limitations stemming from Plaintiff's impairments, the ALJ found  
15 that Plaintiff could perform a full range of work at all exertional levels with a range of  
16 work-related mental limitations. AR 450-51. Relying on vocational expert (“VE”)   
17 testimony, the ALJ found that Plaintiff did not have any past relevant work, but could  
18 perform other medium, unskilled jobs; therefore the ALJ determined at step four of the  
19 sequential evaluation that Plaintiff was not disabled. AR 456-57, 501-502.

20 A. Whether the ALJ properly evaluated the medical opinion evidence

21 Plaintiff contends that the ALJ erred in evaluating the opinions of William Weiss,  
22 Ph.D., Gregory May, Psy.D., Jerry Gardner, Ph.D., and Thomas Clifford, Ph.D. Dkt. 13,  
23 pp. 3-6, 9-10.

1 In assessing an acceptable medical source – such as a medical doctor – the ALJ  
2 must provide “clear and convincing” reasons for rejecting the uncontradicted opinion of  
3 either a treating or examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.  
4 1995) (citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990)); *Embrey v. Bowen*,  
5 849 F.2d 418, 422 (9th Cir. 1988)). When a treating or examining physician’s opinion is  
6 contradicted, the opinion can be rejected “for specific and legitimate reasons that are  
7 supported by substantial evidence in the record.” *Lester*, 81 F.3d at 830-31 (citing  
8 *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d  
9 499, 502 (9th Cir. 1983)).

10 1. Dr. Weiss

11 Psychologist Dr. Weiss examined Plaintiff on August 18, 2014. AR 261-67. Dr.  
12 Weiss’ evaluation consisted of a review of the medical record, a clinical interview, a  
13 mental status examination, and psychological testing. Based on this evaluation, Dr.  
14 Weiss opined it was likely Plaintiff would be unable to maintain gainful employment,  
15 even with the assistance of medication and psychotherapy. AR 267.

16 Dr. Weiss stated Plaintiff had deficits with respect to judgment, insight, and  
17 recent memory. *Id.* Dr. Weiss stated that Plaintiff’s ability to sustain social interaction,  
18 adaptation, concentration and persistence were markedly impaired by her bipolar  
19 disorder, post-traumatic stress disorder, obsessive compulsive disorder, and hoarding  
20 disorder. *Id.*

21 The ALJ assigned “little weight” to Dr. Weiss’ opinion, reasoning that: (1)  
22 Plaintiff’s condition improved with medicine and therapy; (2) Plaintiff was non-compliant  
23 with her treatment regimen; (3) mental status examinations conducted during the period  
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1 at issue were mostly within normal limits; (4) exacerbations in Plaintiff's mental health  
2 symptoms were due to situational stressors; (5) Plaintiff stated that her criminal history  
3 was her most significant barrier to employment; 6) Dr. Weiss' opinion was inconsistent  
4 with the opinion of George May, Psy.D.; and (7) Plaintiff exaggerated her symptoms. AR  
5 453-54.

6 With respect to the ALJ's first three reasons, in its December 2018 remand order,  
7 the Social Security Appeals Council noted that Plaintiff's sporadic treatment attendance  
8 and non-compliance with her medication regimen were consistent with Plaintiff's  
9 "severe" bipolar disorder, and were not necessarily valid reasons for discounting  
10 Plaintiff's symptom testimony. AR 570.

11 Claimants who suffer from mental conditions may have symptoms that wax and  
12 wane, with downward cycles, cycles of improvement, and mixed results from treatment.  
13 *Garrison v. Colvin*, 759 F.3d 995, 1009 (9<sup>th</sup> Cir. 2014).

14 Especially when a claimant suffers from bipolar disorder, the symptoms are  
15 cyclical, and a difference in functional capacity between manic and depressive episodes  
16 does not necessarily constitute substantial evidence for overriding a physician's opinion  
17 that a claimant is significantly impaired. See *Buck v. Colvin*, 540 Fed. Appx. 772, 773  
18 (9<sup>th</sup> Cir. 2013) quoting *Agyeman v. I.N.S.*, 296 F.3d 871, 881 (9<sup>th</sup> Cir.2002) ("Bipolar  
19 disorder is a severe psychiatric illness marked by *episodes* of mania and depression,  
20 impairment of functioning—both cognitive and behavioral, and is frequently complicated  
21 by psychotic symptoms (e.g. delusions, hallucinations, and disorganized thinking).")  
22 (emphasis in original).

1 Further, the Ninth Circuit has recognized that noncompliance with treatment is  
2 consistent with a diagnosis of bipolar disorder. *Winter v. Berryhill*, 711 Fed. Appx. 847,  
3 851 (9th Cir. 2017) (finding claimant's noncompliance with treatment did not undermine  
4 her allegations, "as noncompliance with treatment by individuals with bipolar disorder is  
5 consistent with their diagnosis"); see also *Brewes v. Comm'r of Soc. Sec. Admin.*, 682  
6 F.3d 1157, 1164 (9th Cir. 2012) (stating that claimant's difficulty following through with  
7 treatment was "entirely consistent" with her bipolar disorder, depression, anxiety, and  
8 agoraphobia).

9 Given the nature of Plaintiff's bipolar disorder and other mental impairments, the  
10 ALJ's findings concerning periodic improvement in Plaintiff's symptoms and her non-  
11 compliance with her treatment regimen are not specific and legitimate reasons for  
12 discounting Dr. Weiss' opinion.

13 As for the ALJ's fourth reason, the ALJ emphasized the impairment must prevent  
14 performance of substantial gainful activity -- not situational factors, such as job losses,  
15 economic issues, or homelessness; and any impairment that does not last continuously  
16 for twelve months does not satisfy the requirement. See 42 U.S.C. §§ 423(d)(1)(A):

17 '[D]isability' means inability to engage in substantial gainful activity *by*  
18 *reason of* any medically determinable physical or mental impairment  
19 which can be expected to result in death or which has lasted or can be  
20 expected to last for a *continuous* period of not less than 12 months; . . .

21 42 U.S.C. §§ 423(d)(1)(A) (emphases added).

22 While the ALJ correctly determined Plaintiff endured a series of significant  
23 exacerbating personal stressors during the period at issue, the ALJ misapprehended  
24 the importance of the longitudinal record -- showing that Plaintiff has an extensive  
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1 history of serious trauma; she suffered long term anxiety; and she has struggled with  
2 symptoms of psychological conditions, including bipolar disorder and other mental  
3 impairments, for nearly 30 years. AR 222-23, 230, 232, 238-39, 247, 262-63, 269-339,  
4 342, 361-66, 386, 392, 395, 398, 781, 783, 785, 787, 791, 793, 795, 799, 801, 896-99,  
5 904, 921, 923-24, 929, 934, 943, 946, 950-51, 953, 1007, 1193, 1216, 1220.

6       Regarding the ALJ's fifth reason, the ALJ cited Plaintiff's statement that her  
7 criminal history was her primary barrier to employment. AR 454, 1194. Yet Plaintiff's  
8 criminal activity, particularly her compulsive shoplifting, was identified by medical  
9 professionals as a symptom of her psychological conditions. AR 222-24, 228, 241, 262-  
10 65, 271, 269-339, 361-66, 898, 904, 943. (describing Plaintiff's lengthy history of  
11 shoplifting arrests, and finding that these incidents are a manifestation of Plaintiff's  
12 mental health conditions).

13       As for the ALJ's sixth reason, the fact that Dr. Weiss' opinion differs from Dr.  
14 May's is not, in and of itself, a specific and legitimate reason for discounting his opinion.  
15 *Garrison v. Colvin*, 759 F.3d 995, 1012-13 (9th Cir. 2014) (An ALJ errs when he or she  
16 rejects a medical opinion or assigns it little weight while "doing nothing more than  
17 ignoring it, *asserting without explanation that another medical opinion is more*  
18 *persuasive*, or criticizing it with boilerplate language that fails to offer a substantive basis  
19 for his conclusion.") (emphasis added).

20       Regarding the ALJ's seventh reason – that Plaintiff exaggerated her symptoms --  
21 affirmative evidence of malingering relieves an ALJ from the burden of providing  
22 specific, clear, and convincing reasons for discounting a claimant's testimony. *Greger v.*  
23 *Barnhart*, 464 F.3d 968, 972 (9th Cir.2006); *Morgan v. Comm'r of Soc. Sec. Admin.*, 169  
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1 F.3d 595, 599 (9th Cir.1999). “The essential feature of malingering is the intentional  
2 production of false or grossly exaggerated physical or psychological symptoms,  
3 motivated by external incentives such as . . . obtaining financial compensation . . . or  
4 obtaining drugs.” American Psychiatric Association, *Diagnostic and Statistical Manual*  
5 *of Mental Disorders* 726 (5th ed. 2013) (“DSM V”).

6 Here, the ALJ cites a diagnostic report from December 2018 in which examining  
7 psychologist Mark Clark, Psy.D. stated that Plaintiff displayed “some tendency” towards  
8 exaggeration of symptoms and that the credibility of her statements was “somewhat  
9 questionable.” AR 454, 1194. Dr. Clark’s isolated and equivocal report does not  
10 constitute “affirmative evidence” of malingering, and cannot serve as a specific and  
11 legitimate reason for discounting Dr. Weiss’ opinion, because Dr. Clark’s comment, and  
12 the record as a whole, do not support a finding that there was affirmative evidence of  
13 malingering.

14 If the ALJ had questions about whether any affirmative evidence showed that  
15 Plaintiff was exhibiting behaviors that were evidence of malingering (rather than  
16 behaviors that were related to symptoms of her mental illnesses), the ALJ would have  
17 been required to resolve those questions by asking them of Plaintiff, and potentially  
18 expanding the record to include a mental health professional who would have expertise  
19 in that particular area. In this case, the ALJ did not explore whether affirmative evidence  
20 existed on the issue of malingering, and there is insufficient evidence to support such a  
21 finding. See, *Cole v. Colvin*, 831 F.3d 411, 415-416 (7<sup>th</sup> Cir. 2016) and *Garcia v. Colvin*,  
22 741 F.3d 758, 861-862 (7<sup>th</sup> Cir. 2013) (Court rejected the ALJ’s speculation that  
23 claimant did not seek treatment and was therefore malingering, because the finding of  
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1 malingering was not based on substantial evidence); see *generally*, *Reed v. Colvin*, 779  
2 F.3d 725, 726 (8<sup>th</sup> Cir. 2015) (a suggestion of “possible malingering” in a consulting  
3 psychologist’s examination report concerning an IQ test relating to the claimant’s mental  
4 disability was insufficient to support an ALJ’s determination of malingering).

5 Accordingly, the ALJ has not provided specific and legitimate reasons for  
6 discounting Dr. Weiss’ opinion.

7 2. Dr. May

8 Psychologist Dr. May evaluated Plaintiff on November 14, 2017. AR 903-06. Dr.  
9 May’s evaluation consisted of a clinical interview and a mental status examination.  
10 Based on this evaluation, Dr. May opined that Plaintiff’s prospects for returning to  
11 sustained employment in three to twelve months were “good/fair” and that she would  
12 “likely be most successful” if given simple tasks and not required to interact with the  
13 public. AR 906.

14 The ALJ gave “great weight” to Dr. May’s opinion, citing precisely the same  
15 reasons he discussed when discounting Dr. Weiss’ opinion. Compare AR 454 with AR  
16 453-54. For the reasons discussed above, these findings are not supported by  
17 substantial evidence, and cannot serve as a basis for crediting Dr. May’s opinion any  
18 more than they support discounting Dr. Weiss’ opinion.

19 3. Dr. Gardner and Dr. Clifford

20 Non-examining state agency consultants Dr. Gardner and Dr. Clifford offered  
21 opinions concerning Plaintiff’s mental impairments in 2014. AR 54-55, 64-65, 75-79. In  
22 two of their opinions, Dr. Gardner and Dr. Clifford opined that there was insufficient  
23 evidence to offer an opinion concerning Plaintiff’s mental limitations. AR 54-55, 64-65.

1 In a third opinion from September 2014, Dr. Clifford opined that Plaintiff could perform  
2 simple, routine tasks, but would have difficulty with more detailed tasks, and could  
3 maintain concentration for up to two hours. AR 77-78. Dr. Clifford further opined that  
4 Plaintiff should avoid working with the general public, but could work with a small group  
5 of co-workers and a supervisor, and can meet basic adaptive needs, but may need  
6 assistance setting realistic goals and would benefit from a routine work environment. AR  
7 78-79.

8 The ALJ assigned “great weight” to the opinions of Dr. Gardner and Dr. Clifford,  
9 reasoning that: (1) they had the benefit of reviewing records from several treating  
10 sources and had a longitudinal picture of Plaintiff’s mental health; and (2) Dr. Gardner  
11 and Dr. Clifford are psychological experts and have experience in the vocational issues  
12 that arise in Social Security cases. AR 455.

13 Plaintiff contends that the ALJ’s conclusion that Dr. Gardner and Dr. Clifford had  
14 a “longitudinal picture” of Plaintiff’s mental health is not supported by substantial  
15 evidence given that both Dr. Gardner and Dr. Clifford initially stated that there was  
16 insufficient evidence for them to offer an opinion concerning Plaintiff’s limitations. Dkt.  
17 13, p. 10. Defendant does not dispute this contention, and the opinions of Dr. Gardner  
18 and Dr. Clifford cannot serve as substantial evidence for discounting the opinion of  
19 examining psychologist Dr. Weiss. *See, Lester v. Chater*, 81 F.3d 821, 831-832 (9th Cir.  
20 1995) (A non-examining physician’s or psychologist’s opinion may not constitute  
21 substantial evidence by itself, particularly where those opinions are not otherwise  
22 corroborated by medical evidence in the record, sufficient to justify the rejection of an  
23 opinion by an examining or treating physician or psychologist).

1           B. Whether the ALJ erred in evaluating opinions from other sources

2           Plaintiff contends that the ALJ erred in evaluating the opinion of Julia Swofford,  
3 ARNP and Katy Ham, LMHC. Dkt. 13, pp. 6-7.

4           On December 12, 2014, ARNP Swofford and Counselor Ham offered an opinion  
5 concerning Plaintiff's mental impairments. AR 367. ARNP Swofford and Counselor Ham  
6 did not offer an opinion concerning Plaintiff's precise work-related limitations, but opined  
7 that Plaintiff's prognosis for improvement of her unwanted compulsive behaviors and  
8 obsessive thoughts was "very good" given adequate time and adherence to the  
9 appropriate treatment regimen. *Id.*

10          The ALJ assigned "great weight" to the opinion of Nurse Swofford and Counselor  
11 Ham, citing many of the same reasons he cited in discounting the opinion of Dr. Weiss  
12 and crediting the opinion of Dr. May. Compare AR 455 with AR 453-54. For the reasons  
13 discussed above, the ALJ's findings are not supported by substantial evidence. See  
14 *supra* Section IV.A.

15          C. Whether the ALJ properly evaluated Plaintiff's symptom testimony

16          Plaintiff contends that the ALJ did not provide clear and convincing reasons for  
17 discounting her symptom testimony. Dkt. 13, pp. 10-16.

18          In weighing a Plaintiff's testimony, an ALJ must use a two-step process. *Trevizo*  
19 *v. Berryhill*, 871 F.3d 664, 678 (9th Cir. 2017). First, the ALJ must determine whether  
20 there is objective medical evidence of an underlying impairment that could reasonably  
21 be expected to produce some degree of the alleged symptoms. *Ghanim v. Colvin*, 763  
22 F.3d 1154, 1163 (9th Cir. 2014). If the first step is satisfied, and provided there is no  
23 evidence of malingering, the second step allows the ALJ to reject the claimant's  
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1 testimony of the severity of symptoms if the ALJ can provide specific findings and clear  
 2 and convincing reasons for rejecting the claimant's testimony. *Id.* See *Verduzco v.*  
 3 *Apfel*, 188 F.3d 1087, 1090 (9th Cir. 1999).

4 In discounting Plaintiff's testimony, the ALJ cited the same reasons he cited in  
 5 discounting the opinion of Dr. Weiss and crediting the opinions of Dr. May, Nurse  
 6 Swofford and Counselor Ham. Compare AR 452 with AR 453-55. For the reasons  
 7 discussed above, the ALJ has not provided clear and convincing reasons discounting  
 8 Plaintiff's testimony. See *supra* Sections IV.A and IV.B.

9 D. Whether the ALJ was properly appointed pursuant to the Appointments  
 10 Clause of the United States Constitution

11 Plaintiff, citing the United States Supreme Court's decision in *Lucia v. Securities*  
 12 *and Exchange Commission*, 138 S. Ct. 2044 (2018), contends that the ALJ who  
 13 presided over her case was an "Officer of the United States" within the meaning of the  
 14 Constitution's Appointments Clause – but the ALJ was not constitutionally appointed  
 15 consistent with that provision. Dkt. 13, pp. 18-19. Because this case be resolved without  
 16 considering this claim, the Court declines to address these issues.

17 E. Remand for an Award of Benefits

18 Plaintiff asks this Court to remand this case for an award of benefits. Dkt. 13, pp.  
 19 17-18. "The decision whether to remand a case for additional evidence, or simply to  
 20 award benefits[,] is within the discretion of the court." *Trevizo v. Berryhill*, 871 F.3d 664,  
 21 682 (9th Cir. 2017) (quoting *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987)). If  
 22 an ALJ makes an error and the record is uncertain and ambiguous, the court should  
 23 remand to the agency for further proceedings. *Leon v. Berryhill*, 880 F.3d 1041, 1045  
 24 (9th Cir. 2017). Likewise, if the court concludes that additional proceedings can remedy

1 the ALJ's errors, it should remand the case for further consideration. *Revels*, 874 F.3d  
2 at 668.

3 The Ninth Circuit has developed a three-step analysis for determining when to  
4 remand for a direct award of benefits. Such remand is generally proper only where

5 “(1) the record has been fully developed and further administrative  
6 proceedings would serve no useful purpose; (2) the ALJ has failed to  
7 provide legally sufficient reasons for rejecting evidence, whether claimant  
8 testimony or medical opinion; and (3) if the improperly discredited  
9 evidence were credited as true, the ALJ would be required to find the  
10 claimant disabled on remand.”

11 *Trevizo*, 871 F.3d at 682-83 (quoting *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th  
12 Cir. 2014)).

13 Here, the ALJ erred in evaluating the medical opinion evidence and Plaintiff's  
14 testimony. This evidence establishes that Plaintiff has marked mental limitations, her  
15 condition has not responded to treatment, and has been struggling with a set of  
16 intractable symptoms for approximately 30 years. AR 262-63, 267, 269-339, 361-66,  
17 898, 904. During the hearing, the vocational expert testified that there would be “zero  
18 tolerance” for an individual who stole items from a job site. AR 48-49. The record has  
19 been fully developed, and if Plaintiff's testimony and the opinion of Dr. Weiss were  
20 credited as true, the ALJ would be required to find Plaintiff disabled on remand. See  
21 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1041 (9th Cir. 2007) (“[W]e will not remand for  
22 further proceedings where, taking the claimant's testimony as true, the ALJ would  
23 clearly be required to award benefits.”).

24 Accordingly, remand for an award of benefits is the appropriate remedy.  
25

CONCLUSION

Based on the foregoing discussion, the Court finds the ALJ erred when he found Plaintiff was not disabled. Defendant's decision to deny benefits is therefore REVERSED and this matter is REMANDED for an award of benefits.

Dated this 23rd day of March, 2021.



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Theresa L. Fricke  
United States Magistrate Judge